In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 938

CENTRAL MACHINE & TOOL COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that petitioner wrongfully discharged an employee because of his union activities, and unlawfully refused to bargain with the union by negotiating in bad faith, failing and refusing to meet at reasonable times, unilaterally granting wage increases, unilaterally withdrawing a quarterly bonus, and refusing the union's request for information regarding the unilateral wage increases (R. 1055, 1075,

1077-1078).[1] The court of appeals sustained these findings (Pet. App. III, 3-5), and petitioner does not challenge them here. The Board also found that petitioner refused to bargain, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by conditioning agreement with the union upon a contract clause which required the union, before striking, to present the issue to the membership of the bargaining unit, and to obtain the approval of more than 50 per cent of the members of the unit. The Board found the situation identical to that in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, where the Court held that insistence on a similar "ballot" clause was unlawful. Such a clause falls outside the area of mandatory bargaining under the Act because it "settles no term or condition of employment." 356 U.S. at 350. Agreeing that *Borg-Warner* controlled, the court of appeals sustained the Board's finding with respect to the ballot clause (Pet. App. III, 6-9).

2. The sole question presented by the petition is whether this Court should reconsider and reverse its holding in *Borg-Warner*, adopting instead the dissenting view, 356 U.S. at 351, that insistence on a ballot clause is not unlawful under the Act. The petition should be denied, for, contrary to petitioner's suggestion, nothing has occurred in the 12 years since *Borg-Warner* that warrants reexamination of that decision.

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[1] "R." references are to the appendix to the briefs in the court below.

The courts of appeals have uniformly applied the principle of *Borg-Warner* and have experienced no problem in doing so.[2] *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, does not impair the rationale of *Borg-Warner*. As the court below properly recognized (Pet. App. III, 8-9), *Porter* merely holds that the Board lacks power to compel the employer to accept a contract provision covering a mandatory bargaining subject—there the checkoff of union dues[3]—where the parties had not reached

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[2] See, *e.g.*, *Marine & Shipbuilding Workers* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3), certiorari denied, 375 U.S. 984; *National Labor Relations Board* v. *Bricklayers & Masons Int'l, Local No. 3*, 405 F. 2d 469 (C.A. 9); *Oil Chemical & Atomic Workers* v. *National Labor Relations Board*, 405 F. 2d 1111, 1117 n. 18 (C.A.D.C.) (citing many cases).

In *Allen-Bradley Co.* v. *National Labor Relations Board*, 286 F. 2d 442, 445 (C.A. 7), on which petitioner relies (Pet. 13), the court expressly distinguished the clause there involved—a provision limiting the union's right to discipline or fine its members—on the ground that it "is more akin to the 'no-strike' clause which the Court in *Borg-Warner* recognized as concerned with 'relations between the employer and the employees' and therefore, a proper matter for collective bargaining." Moreover, the Seventh Circuit has since cast doubt on the continued vitality of *Allen-Bradley*. See *Scofield* v. *National Labor Relations Board*, 383 F. 2d 49, 54 (C.A. 7), affirmed, 394 U.S. 423.

[3] Prior to *Borg-Warner*, the checkoff had been held to be within the area of "terms and conditions of employment." See *U.S. Gypsum Co.*, 94 NLRB 112, 113, n. 7 (1951); *Reed & Prince Mfg. Co.*, 96 NLRB 850, 857 (1951), enforced, 205 F. 2d 131, 136 (C.A. 1), certiorari denied, 346 U.S. 887. Thus, the fact that the Court in *Porter* assumed the checkoff to be a proper subject of negotiations is not evidence of "erosions of the rules relating to mandatory and permissive bargaining * * *." (Pet. 12).

agreement on that subject in their negotiations. Nothing in *Porter* suggests that the employer is free to condition a contract on a subject outside the area of mandatory bargaining, such as the ballot clause here, or that the Board cannot, as a remedy for that unlawful insistence, order the employer to execute the contract which has otherwise been agreed to, omitting the ballot clause.[4] See *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ARNOLD ORDMAN,
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DECEMBER 1970.

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[4] The Board ordered petitioner, at the union's option, to execute the agreement offered by it to the union omitting the ballot clause (Pet. App. I, 15).

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